STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	**:**	
	:	
Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act	**:**	**01-0614**

REPLY BRIEF ON EXCEPTION OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Reply Brief on Exceptions to the Brief on Exceptions of Ameritech Illinois ("Ameritech BOE") to the Administrative Law Judge's Proposed Order issued on March 8, 2002 ("Proposed Order").

INTRODUCTION

Ameritech's wholesale attack on the Proposed Order in its BOE must be rejected. Section 13-801 makes clear the General Assembly's intent to impose additional State requirements on carriers that avail themselves of an alternative regulation plan pursuant to Section 13-506.1 of the PUA. Notwithstanding this clear expression of legislative intent, Ameritech essentially attacks the Proposed Order for failing to limit Section 13-801 to a mirror image of the 1996 Act. As explained in more detail below, Ameritech's arguments lack merit and would undermine the pro-competitive goals of Section 13-801.

ARGUMENT

I. AMERITECH'S COLLOCATION TARIFF DOES NOT COMPLY WITH THE COLLOCATION REQUIREMENTS OF SECTION 13-801(c)

In its Brief on Exceptions, Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") argues that its proposed amendments to its existing tariff should be accepted and that the various findings of the Proposed Order on this issue should be set aside. *See, generally,* Ameritech BOE at 28 *et seq*. Specifically, Ameritech contends that the elimination of the "necessary" standard is unsupported by Section 13-801(c) and contrary to the Telecommunications Act of 1996 ("TA 1996" or "TA 96" or "1996 Act"), and that the Staff's proposed language on multifunctional equipment adopted by the Proposed Order should either be rejected or modified.

A. The Proposed Order's Elimination Of The Word "Necessary" Is Correct And Consistent With the Law

Contrary to Ameritech's assertion, the Proposed Order correctly interprets the letters of Section 13-801(c). Ameritech has maintained that Staff's interpretation, which was affirmed by the Proposed Order, was inconsistent with TA 1996 and several FCC orders. This position is simply incorrect. Ameritech's arguments are based upon two defective premises.

First, Ameritech argues that the Proposed Order's interpretation of Section 13-801(c) is inconsistent with TA 1996 and FCC rules and orders. In fact, Ameritech asserts that the Proposed Order expressly runs counter to Section 261(c) of TA 1996. Ameritech BOE at 29 - 30. Second, Ameritech implies that the Proposed Order violates the basic principle of statutory construction as it seems to engender unconstitutional or invalid interpretation. See Ameritech BOE at 30–33. These assertions are without merit.

In essence, Ameritech argues – not for the first time – that the Commission is preempted by a federal enactment from enforcing state law. In fairness to Ameritech, it characterizes this as a statutory construction argument rather than an argument based on preemption, Ameritech BOE at 32, but this is a distinction without a difference.

Ameritech makes a sophisticated and erudite statutory construction argument, but one that must ultimately fail. This is because Ameritech, while invoking numerous principles of statutory construction, assiduously avoids application of the most important principle: that the primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute which is expressed in the plain meaning of the statute. Bruso v. Alexian Brothers Hospital, 178 Ill. 2d 445, 452; 687 N.E. 2d 1014 (1997).

This is important, because legislative intent should be sought primarily from the language of the statute, People v. Beam, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977), since the language of the statute is the best evidence of legislative intent, Bruso at 451, and provides the best means of deciphering it. Matsuda v. Cook County Employees and Officers Annuity and Benefit Fund, 178 Ill. 2d 360, 365; 687 N.E. 2d 866 (1997). Moreover, if the legislature's intent can be determined from the plain language of the statute, that intent must be given effect, *without further resort to other aids to statutory construction*. Bruso at 452. Thus, the threshold task for a court or tribunal in construing a statute is to examine the terms of the statute. Toys "R" Us v. Adelman, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3rd Dist. 1991).

Ameritech attempts, unsuccessfully, to circumvent this. Its statutory construction argument invokes supplementary principles of statutory construction, because first principles yield what is, to Ameritech, a distinctly unpalatable result.

In Section 13-801(c), as the Proposed Order correctly observes, "the legislature has spoken distinctly, succinctly and unambiguously; 'any equipment' means just that." Proposed Order at 18. The word "necessary" is nowhere to be found in the statute, regardless of how deftly Ameritech wields supplementary statutory construction principles. Ameritech's attempt to find legislative intent by wishing the actual statutory language away must, therefore, ultimately fail.

Moreover, Ameritech, in its application of certain rules of statutory construction, violates several other rules of statutory construction. A court or tribunal must construe a statute *as it is*, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute's application -- regardless of its opinion regarding the desirability of the results of the statute's operation. Adelman, 215 Ill. App. 3d at 568; *cf*. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2nd Dist. 1981) (in determining that application of statute of limitations barring minor's products liability claim was proper, if perhaps harsh, court observed that, where statute is clear, only legitimate role of court is to enforce the statute as enacted by legislature); People *ex rel.* Racing Bd. v. Blackhawk Racing, 78 Ill. App. 3d 260, 397 N.E. 2d 134 (1st Dist. 1979) (court observed that, though the General Assembly could have enacted a statute more effective in accomplishing its purpose than the one it did enact, the court was not permitted to rewrite the statute to remedy this defect). In other words, tribunals construing statutes generally cannot add provisions, which is precisely what Ameritech urges the Commission to do here.

The Proposed Order faithfully interprets the legislative intent of the General Assembly embodied in Section 13-801(c), by the simple and entirely proper expedient of reading the actual text of Section 13-801(c). In contrast, Ameritech invokes statutory construction principles to import the word "necessary" into the statute, in defiance of the irksome detail that "necessary" cannot be found in the statute, thereby limiting the company's obligations as determined by the General Assembly. The Commission should adopt the Proposed Order's simple – and, based upon statutory construction principles, impeccable -- analysis.

Staff's position – adopted in the Proposed Order – conforms to both the letter and the spirit of the law. Section 13-801(c), enacted after the Commission's decision in Docket 99-0615, imposes new and more stringent requirements upon Ameritech. Provisions of law must take precedence over the existing tariff terms, especially where, as here, the law was enacted after the tariff. Ameritech fails to address this fact.

The remainder of Ameritech's position is little more than a reiteration of its by now familiar – and discredited – preemption argument. Ameritech claims that the Proposed Order is based on the premise that "because the word "necessary" does not appear in Section 13-801(c), the General Assembly must have intended to impose upon Ameritech Illinois collocation obligations greater than those imposed by the 1996 Act." This assertion is correct as far as it goes. There are, however, a number of reasons why the Commission need not concern itself with this. First, as the Proposed Order correctly finds, "the legislature has determined that, in Illinois, it is appropriate that Ameritech be required to bear additional obligations as the price to pay for being the only ILEC being regulated under an alternative form of regulation." Proposed Order at 18. In other words, Section 13-801 – imposing state-imposed *obligations* -- applies only to carriers that have sought and obtained the state-conferred *benefit* of alternative regulation. Ameritech can, if it chooses to do so, completely avoid the *obligations* of Section 13-801 by simply renouncing the *benefits* it obtains from alternative regulation under Section 13-506.1.

Second, as the Staff has argued in several[1] Commission proceedings, including this one, that Ameritech is not making its preemption argument before a tribunal that can offer it the relief it seeks; accordingly the Staff will not reiterate this arguments here, except to note that Ameritech can, if it wishes, seek preemption of Section 13-801 under Section 254(d) of TA '96. The Commission may be justified in inferring that the company's failure to do so is perhaps indicative of less confidence in the argument than is expressed in the company's Commission pleadings.

Ameritech further argues that the Proposed Order's interpretation of Section 13-801(c) is impermissible under Section 261(c) of TA 96. To fully analyze this argument, one must refer to Section 261(c), which provides that:

> Nothing in this part [47 USC §§ 251 *et seq*.] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 USC § 261(c)

[1] The Proposed Order indicates that the Staff has made this argument on "numerous" occasions, which is perhaps a rather extravagant assertion.

Ameritech's argument relies on its now-familiar construction of the statutory phrase "State[ ] requirements … not inconsistent with this part" to mean "State[ ] requirements *absolutely identical* to this part." In other words, Ameritech takes a federal statute that authorizes states to impose state-specific requirements in order to further competition, and urges the Commission to read it to permit such state requirements *only* where those requirements are the same as federal requirements. This, rather obviously, would render Section 261(c) absolutely meaningless. Having attempted to get the Commission to find words in Section 13-801(c) that *do not* exist, Ameritech now urges the Commission to negate provisions of a federal statute that actually *do* exist. As such, statutory construction principles suffer a certain amount of indignity at Ameritech's hands.

In any case, Ameritech's statutory construction and preemption arguments are baseless. They should, therefore, be rejected.

B. Staff's Position On Multifunctional Equipment Is Correct

Ameritech's heroic, if ineffectual, grappling with Section 13-801(c) is not by any means limited to its attempt to manufacture "necessary" out of whole cloth. Ameritech further contends that the tariff language proposed by Staff regarding multifunctional equipment should be rejected or modified, arguing – as is undoubtedly the case – that "Section 13-801(c) does not refer to multifunctional equipment." Ameritech BOE at 34.

At first blush, this argument smacks modestly of genius, at least in the F. Scott Fitzgerald sense[2]. The ability to assert, successively that the word "necessary" ***should***

[2] "The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function." F. Scott Fitzgerald, *The Crack-Up*, 1940

be read into the statute, despite the fact that it cannot be found there, and that the phrase "multifunctional equipment" *should not* be read into the statute, because it cannot be found there, takes arguing in the alternative to what is, one hopes, its logical extreme. However, more careful analysis reveals that this argument is defective for the same reasons that Ameritech's previous argument is defective. The statute clearly states that that an incumbent local exchange carrier "shall provide for physical or virtual collocation of any type of equipment for interconnection or access to network elements[.]" 220 ILCS 5/13-801(c) (emphasis added).

Ameritech's "multifunctional equipment[3]" argument is therefore identical to its "necessary" argument. Ameritech seeks, again, to impose conditions upon the term "any equipment" where the General Assembly imposed none, attempting to import the terms of the Collocation Remands Order into its tariff. Ameritech BOE at 34. This is, however, futile: "any equipment" obviously includes "multifunctional" equipment. The General Assembly has spoken to this issue, and determined that "any" equipment could be collocated, rather than "any necessary, non-multifunctional equipment," as Ameritech would have the Commission believe.

Moreover, this argument is, other matters aside, is contrary to Ameritech's initial position in which it proposed the *inclusion* of multifunctional equipment. *See* Ameritech Illinois Exhibit 5.1 (Rebuttal Testimony of Bates), page7. Ameritech had offered to amend its tariff in the rebuttal testimony through witness Ms. Bates even though it never

[3] Ameritech does not, it appears, object to the collocation of certain multifunctional equipment; its objection appears to be to the presence of the phrase "multifunctional equipment" in the tariff.

incorporated the proposed language into the tariff it eventually submitted to the Commission.

For the sake of clarification, Staff's recommendation, which was adopted by the Proposed Order that the term "multifunctional equipment" be included in AI's tariff, is on all fours with the statute. Consequently, it should neither be rejected nor modified, as Ameritech proposes.

II. AMERITECH ILLINOIS PROPOSED TARIFF DOES NOT MEET THE STATUTORY REQUIREMENTS FOR CROSS-CONNECTS

Ameritech takes exception to the Proposed Order's adoption of Staff's proposal that Ameritech's collocation language, which is ambiguous and imprecise, should be modified. Ameritech BOE at 35 *et seq*. Ameritech claims that neither the Proposed Order, nor the Staff proposal it adopted, took note of the differences "between safety and network reliability standard" regarding cross-connections pursuant to Section 13-801(c), and "prudent safety and security procedures." This claim is simply wrong. The Proposed Order, consistent with Staff's recommendation, rejected "Ameritech's proposed language, which [the Commission] find[s] goes far beyond the requirements that collocation be permitted with only an eye to basic safety and network reliability benchmarks. " Proposed Order at 29.

Here, again, Ameritech attempts to find additional statutory conditions where none exist. The statute in question, Section 13-801(c), provides, in relevant part, that: "An incumbent local exchange carrier shall allow, and provide for, the most reasonably direct and efficient cross-connects, that are consistent with safety and network reliability standards, between the facilities of collocated carriers." Ameritech urges the Commission to find, in this unambiguous provision, a legislative intent to impose additional “prudent safety and security procedures that must be followed by Ameritech Illinois and its vendors, as well as the CLECs and their vendors, when working in Ameritech Illinois offices.” Ameritech BOE at 35-6. As the Proposed Order correctly notes, this “goes far beyond the requirements that collocation be permitted with only an eye to basic safety and network reliability benchmarks.” Proposed Order at 29.

Ameritech mischaracterizes the Staff’s position. At no time did Staff recommend that the Commission abandon the application of any set of rules that promotes prudence. Section 13-801(c), as Ameritech notes, Ameritech BOE at 36, does not include a catalog of clerical detail regarding operating terms and conditions that the company is expected to insert in its proposed tariff. Such an absence, however, is not a license to import Ameritech’s proposed language into the tariff.

The Proposed Order’s conclusion, which requires Ameritech to provide cross connections between collocated and non-collocated carriers, should remain because it is a faithful interpretation of the plain text of Section 13-801(c) regarding cross-connections. Ameritech admits that its proposed collocation tariff in Paragraph 5 on Sheet 11(Ill. C.C. No. 20, Part 23, Section 4) “deals exclusively with direct connections between collocated carriers,” but then argues that “other provisions of the Company’s proposed tariffs address the statutory requirements related to cross-connections between …a non-collocated carrier and the facilities of a collocated carrier.” Ameritech BOE at 37. The Staff has no reason to doubt this, even though Ameritech cites no tariff provision that allows non-collocated carriers to cross-connect with collocated carriers; the fact is that the proposed tariff at issue here contains no such provisions. Moreover, as has been observed elsewhere, Ameritech’s tariffs are often not models of clarity, and locating specific provisions in them is often something that cannot, even with the best will, be accomplished. See, e.g., Proposed Order on Reopening at 8, Docket No. 98-0396 (the Proposed Order notes that attempting to locate certain non-recurring charges involves “sending the reader off on an excursion throughout Ameritech’s tariff morass.”) Thus, Ameritech’s proposed collocation tariff language on cross-connections is simply too vague, equivocal and uncertain; it does little to inform CLECs regarding rates, terms, and conditions. This is poor public policy.

The Proposed Order’s conclusion that specifically directs Ameritech to allow cross-connections between collocated and non-collocated is reasonable, clear, and unambiguous should be preserved.

III. THE PROPOSED ORDER’S FINDINGS ON THE GENERAL TERMS AND CONDITIONS ISSUE SHOULD BE MODIFIED TO REFLECT STAFF RECOMMENDATIONS

The Staff has maintained throughout this proceeding that Ameritech’s proposed General Terms and Conditions are not only ambiguous, but afford the company a plenary power both in terms of interpretation and implementation. Staff believes as a result of these defects, Ameritech’s proposed tariff language should be modified to reflect Staff’s recommendations. Therefore, Staff is urging that the Proposed Order be amended to reflect Staff recommendations.

In addition, in its BOE, Ameritech now argues that its proposed language should be left undisturbed on two more grounds: preemption doctrine and the Supremacy Clause. *See* Ameritech BOE at 108 *et seq*. Ameritech asserts that it is impossible for the company to make its tariff language comply with Section 13-801, while at the same time render it consistent with federal law. This assertion is simply inaccurate. The legal obligations Section 13-801 imposes on Ameritech are not in conflict with requirements of federal law. In the instant case, the bone of contention is that the General Terms and Conditions that are at issue are potentially confusing and ambiguous. Nothing about preemption and the Supremacy Clause is at stake on this issue. However, Ameritech has chosen to ignore this fact and instead mount a generalized allegation that the Proposed Order conclusion and Staff position on this issue are preempted.

Ameritech asserts that its proposed tariff language would, if adopted, avoid Supremacy Clause issues. Until now, Ameritech has not advanced this argument. It is defective for the reasons set forth elsewhere in this Brief. Ameritech's arguments regarding preemption and the Supremacy Clause should be rejected while Staff's recommendations and proposed modification should be accepted.

IV. THE PROPOSED ORDER SHOULD KEEP THE ADOPTED STAFF'S LANGUAGE REGARDING PRESUBSCRIPTION AND PIC CHANGES

Ameritech argues that the Proposed Order should reject the adopted Staff's language on the issues of Presubscription and PIC Changes. *See* Ameritech BOE at 118 *et seq*. The Commission should reject this proposal. Staff suggested revisions to Ameritech's proposed tariff language that faithfully comply with the requirements of Section 13-801 on these two issues. In spite of this fact, Ameritech continues to object to the two revisions in the Proposed Order: the clarification of the words "all local exchange and access services," and the removal of the word "preexisting" in its proposed tariff language. Ameritech BOE at 118 *et seq*. Ameritech's suggestion that the Proposed Order should be amended to reflect its position should be rejected.

Contrary to Ameritech's assertion that its clarifying language is necessary for better understanding of the words "all local exchange and access services," in fact the result will undoubtedly be confusing and equivocal. There is nothing wrong in the insertion of the word "telecommunications" before the word "services." In fact, the reason for the insertion of the word "telecommunications" is to make clear what type of services to which the language applies. Assuming for the sake of argument that Ameritech's tortuous interpretation is that the Proposed Order can be given an expansive reading by CLECs who would then require Ameritech to provide services it neither provides nor controls, this strains credulity. Section 13-203 of the Public utilities Act makes clear what constitutes telecommunications services in Illinois, and if Ameritech does not provide nor control a service, no carrier can request – nor can the Commission order -- that Ameritech be responsible for disposing of revenues associated with such service. Therefore, Staff recommends that the Proposed Order should not be altered to accommodate Ameritech's objection on this issue.

Ameritech also objects to the removal of the word "preexisting" from its proposed tariff language by the Proposed Order. Ameritech BOE at 119 *et seq*. Specifically, Ameritech takes exception to the Proposed Order's interpretation of how compliance with the requirements of Section 13-801(d)(6) should be accomplished. In fact, Ameritech states that the "Proposed Order's analysis misses an important point," presumably because of concerns regarding the provisioning interval. This is simply not an accurate description of the issue. The state of the law is that Section 13-801(d)(6) does not provide for Ameritech's categorization, which if adopted, would have resulted in the Commission having to label UNE-P combinations as either "preexisting" or "new." The Proposed Order's refusal to accept Ameritech's categorization is correct.

Therefore, Staff urges that Ameritech's recommendations to modify the Proposed Order so as to reflect Ameritech's proposed tariff language should be rejected.

V. ORDINARY COMBINATIONS

Ameritech asserts that it has properly interpreted and applied the requirements of Section 13-801(d)(3). Ameritech BOE at 39. In support of this assertion, Ameritech argues that it has included in its proposed tariff all of the UNE-P and EEL combination contained in the Draft I2A, plus additional UNE-P combinations that are not found in the I2A. Ameritech has not, however, offered any evidence that these are all of the combinations of UNEs that Ameritech ordinarily combines. In fact, Ameritech has not even asserted that these are all of the UNE combinations that it ordinarily provides.

In explaining its interpretation of the term "ordinarily combined," Ameritech first argues that "ordinarily combined" is a "limiting phrase." Ameritech BOE at 40. On this point Ameritech, Staff, and the Proposed Order Agree. Proposed Order at 57. It is the nature and extent of the limitations that are at issue.

Ameritech argues that term "ordinarily combined" should not be construed, as Staff has construed it, relate in any way to the frequency and conditions under which Ameritech performs the work to combine network elements. Ameritech BOE at 42. Rather, Ameritech argues that "ordinarily combined" should be interpreted according to the uses to which combinations of UNEs are put, and that "at most the phrase should be construed to refer to UNEs combined to provide services offered to residential and small business customers on a widespread or mass market basis." Ameritech BOE at 40. Ameritech supports this claim by noting that Staff's approach requires the Commission to address the potentially difficult problem of how frequently a particular sequence of UNEs should be applied. Ameritech BOE at 42.

Staff concurs with Ameritech that defining the frequency and conditions under which Ameritech performs the work of combining network elements is a non-trivial exercise. However, the Commission should not discard the correct interpretation of Section 13-801(d)(3) in favor of one that is easier to implement but incorrect. Further, the task of defining the frequency and conditions under which Ameritech performs the work of combining networks elements, a difficult exercise to begin with, has been made all the more difficult by Ameritech's categorical refusal to provide any information on the frequency and conditions under which it performs the work to combine network elements for itself. *See* Staff BOE at 36-38.

This is a particularly salient concern. In Docket Nos. 96-0486/0569, the Commission directed Ameritech to provide, in its compliance filing, information addressing the following five compliance items:

a. A description of the extent to which the separate elements of each combination are combined in Ameritech Illinois' own network for its own use.

b. The separate unbundled element prices that Ameritech Illinois proposes would apply to a purchase of the combination.

c. A description of any additional activities, and costs of those activities, required to provide each unbundled element combination, where Ameritech seeks to recover the cost of those activities.

d. An identification of each nonrecurring charge that Ameritech proposes would, or may, apply to the purchase of the unique combination; including an identification of all nonrecurring charges which Ameritech Illinois proposes would or may apply to the situation where end users' existing service is converted "as-is" to a new entrant.

e. A description of the basis for calculation of each nonrecurring charge Ameritech Illinois proposes would apply.

TELRIC Order at 125.

The Commission has since determined that Ameritech did not comply with this Order. Order at 94, Docket No. 99-0396.

Accordingly, to the extent that it is administratively difficult to determine how frequently Ameritech combines certain network elements, that difficulty is entirely attributable to Ameritech's failure to comply with a Commission order entered in February of 1998. The Staff has a certain amount of difficulty understanding why this failure should inure to Ameritech's benefit, as the company contends here. It is reasonable and equitable here to determine that, in light of Ameritech's failure to comply with a four-years old Commission order, the Commission need not concern itself with Ameritech's complaints regarding administrative burdens, since the company caused the problems that impose the burdens in question.

Ameritech's interpretation of "ordinarily combined" appears to be "ordinarily combined on a widespread, mass-market basis to serve residential and small business customers." *See* Ameritech BOE at 40. Ameritech therefore believes that any combination that occurs less often than such "widespread, mass-market" combinations falls outside of the definition of "ordinarily combined." In other words, if something does not occur all the time, it is not an "ordinary" occurrence.

Ameritech's attempt to redefine "ordinarily combined" in this proceeding is at odds with the FCC's use of that term. Although the term "ordinarily combined" was used in paragraphs 296 and 1380 of the FCC's Local Competition Order[4], as well as in §51.315(c) of the FCC's rules adopted pursuant thereto, no mention was made therein to any mass market criteria or definition. Further, in the UNE Remand Order[5] the FCC observed that "[it] concluded [in the Local Competition Order] that the proper reading of 'currently combined' in rule 51.315(b) means 'ordinarily combined within their network, in a manner which they are typically combined.' UNE Remand Order, ¶ 479. Thus, it appears that the FCC views "ordinarily combined" as a far broader concept than "typically combined", and thus "ordinarily combined" could be read to be more expansive than Staff's language.

Staff's proposed language regarding ordinarily combined is as follows:

> "Ordinarily combined" means that the requested combination is of a type ordinarily used or functionally similar to that used by the Company or the Company's end users where the Company provides local service.

Staff witness Chris Graves testified that Staff's definition of "ordinarily combined" proposed in this docket was based on the Commission's Order in Docket 98-0396. ICC Staff Ex. 1.0 (Graves), pp. 17-19. The above-quoted language was adopted by the Commission when it adopted the AT&T/MCI proposed tariff. Order, Ill. C.C. Docket No.

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[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499 (rel. Aug. 8, 1996) ("Local Competition Order"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) & *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, and remanded sub nom. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Util. Bd.*), *aff'd in part and vacated in part on remand*, *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *cert. granted sub nom. Verizon Communications Corp. v. FCC*, 121 S.Ct. 877 (2001).

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (UNE Remand Order).

98-0396, p. 95. Ameritech did not request rehearing or clarification on the definition of "ordinarily combined" in its motion for rehearing in docket 98-0396.

Ameritech criticizes Staff's definition of "ordinarily combined" for its use of the term "functionally similar." Ameritech BOE at 42. As noted above, this definition was previously adopted by the Commission. Staff believes that the "functionally similar" term was used by the Commission to prevent a narrow interpretation of "ordinarily combined" by Ameritech that would prevent CLECs from ordering new combinations. Indeed, the Commission specifically found "that Ameritech's interpretation of Rule 315(b) is unreasonably narrow as it would limit combinations to specific customer combinations that are presently in place, rather than the type of combinations the ILECs currently provide to themselves and customers as a matter of course." Order, Ill. C.C. Docket No. 98-0396, p. 94.

Ameritech criticizes the broadness of Staff's proposed definition, which was adopted in the Proposed Order, stating that Staffs interpretation is "…no more supportable than a claim that, because the Chicago Cubs have made the playoffs three times in the last 20 years, the Cubs 'ordinarily' make the playoffs." Ameritech BOE at 42. The Staff agrees with Ameritech that, when the Chicago Cubs find their way into post-season play, it is clearly an "extraordinary" event by any rational standard, similar in this respect to the eruption of Mt. St. Helens, or the birth of octuplets. However, Ameritech's analogy is inapposite; the Staff feels that a more telling analogy can be drawn from the National Pastime.

Under Ameritech's definition, Barry Bonds does not "ordinarily" hit home runs. After all, Mr. Bonds hit only 73 home runs in 2001, in fully 476 official at bats.

Accordingly, the likelihood that Mr. Bonds would hit a home run in any given at-bat during the 2001 season was a very modest 15.3%. Moreover, in his major league career, Mr. Bonds has hit only 572 home runs in 7955 official at-bats, meaning that his career home run percentage falls to a genuinely woeful 7.1%. Obviously, Barry Bonds hitting a home run, which he does only every fourteenth time at bat, is not an "ordinary" occurrence, if Ameritech is to be credited.

Perhaps, however, an even more telling analogy can be drawn from the world of fast food. McDonald's franchisees "combine" various products, including cooked hamburger patties, a bun, lettuce, onions, pickles, a substance described as "special sauce," and a slice of something purporting to be cheese, into something called a "Big Mac©." It is safe to infer that McDonald's "ordinarily combines these sandwich elements into a bundled retail sandwich offering.

If McDonald's had enjoyed a government-granted monopoly for a number of years, and then was compelled to unbundle its services, it would offer unbundled sandwich elements (hereafter "USEs") to competitors. It would be required to offer its "Big Mac©" as "USE-P." Moreover, since the company's motto is, for reasons that are unclear, "We Love to See You Smile," the company would no doubt add an additional pickle, or not add special sauce, if a customer requested this, although such requests would be quite uncommon, and not encouraged.

There's the rub, as the Bard would say. Under Ameritech's definition of "ordinarily combined," McDonald's does not "ordinarily" offer the extra-pickle, no sauce version of USE-P because it is not a "mass-market" offering that the company advertises and sells a great many of[6]. Accordingly, McDonald's would not be required to offer this to its competitors. However, McDonald's could continue to provide this service, which it ordinarily, although not frequently, undertakes for its own customers.

Additionally, Ameritech points to examples from various Commission dockets that it asserts reflect a common understanding that Ameritech is required to provide ordinary combinations in order to encourage mass market competition in Illinois. Ameritech BOE at 43-45. To Staff's knowledge, no party disputes this. Ameritech, however, further asserts that the passages cited indicate that ordinary combinations are required solely for the purpose of encouraging mass-market competition in Illinois. Ameritech BOE at 45. There is no basis for this restriction in either the passages Ameritech cites or Section 13-801(d)(3). As indicated above, the General Assembly directly required Ameritech[7] to do the work to combine elements that Ameritech ordinarily combines for itself. The General Assembly did not limit this obligation based upon the use to which the combinations would be put. In fact, the General Assembly did precisely the opposite. Section 13-801(d) indicates directly that these combinations must be provided to requesting telecommunications carriers "for the provision of an existing or a new telecommunications service[,]" without any qualification regarding the customer to be served. Accordingly, Ameritech's proposed definition has more of a basis in hope than in section 13-801.

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[6] Likewise, McDonald's would not be required to unbundle its fish sandwich into a UFE-P offering, although competitive local sandwich providers might not complain about this.

[7] As Ameritech is the only company in Illinois that has sought and obtained alternative regulation under Section 13-506.1 of the Public Utilities Act, it is the only company subject to Section 13-801.

Further Ameritech argues that Section 13-801(d)(4) speaks to the manner in which a network element platform may be used. Ameritech BOE at 18. It is not at all clear why precisely Ameritech concludes this to be the case. Section 13-801(d)(4), while it certainly does describe the uses to which a network element platform can be used – "end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers[.]" 220 ILCS 5/13-801(d)(4). This, however, does not place any real limitation upon the uses to which platforms may be put, and certainly does not mention the customer classes that may or may not be served. Indeed, conspicuously absent from Section 13-801(d)(4) is any limitation restricting usage of the platform to mass-market services.

Ameritech argues that the General Assembly indicated its intent to remove Ameritech's obligation to provide to CLECs products and services that CLECs can use to provide their own non-mass market offerings when the General Assembly declared Ameritech's business markets competitive. Ameritech BOE at 46. However, the relationship between Section 13-801 and the General Assembly's competitive declaration is precisely the opposite of what Ameritech suggests. A key factor in the development of competition in the business market has been the availability of Ameritech wholesale UNE product offerings. These products and services will also serve a key role in the continued viability of competition in Illinois. By making these obligations explicit in Section 13-801 the General Assembly has put in place provisions that will ensure that competitors have the ability to compete with Ameritech in Illinois business markets. These considerations are similar to those the FCC requires carriers to demonstrate exist when carriers submit requests for Section 271 interLATA long distance authority. *See* FCC Rhode Island 271 Order, Appendix D, ¶71. As noted above, this interpretation of the General Assembly's intent is, unlike Ameritech's, supported by the direct language of Section 13-801.

Ultimately, the definition employed by Ameritech is of little consequence. Ameritech, while devoting considerable effort to defending its definition, makes no claim that its proposed UNE combinations offerings are consistent even with this definition. Ameritech simply asserts that it has provided all of the UNE combinations listed in the Draft I2A, and that with the additional of a few UNE-P combinations included in its proposed tariff, these combinations encompass all residential and business basic dialtone lines, ISDN lines, Centrex lines, and pay telephone lines. Ameritech BOE at 39. Ameritech does not, however, assert that the combinations that it proposes to provide to competitors are all of the combinations of network elements it ordinarily combines for itself to provide these services. In other words, Ameritech has not demonstrated statutory compliance at all, and is attempting to use its definition of "ordinarily combined" as a sort of *post hoc* rationalization for its failure.

Ameritech alleges that Proposed Order fails to adequately address its competitive arguments. Ameritech BOE at 48. As its competitive arguments are singularly lacking in merit, this oversight is likely to cause no harm. However, to the extent the Commission determines that Ameritech's competitive arguments actually need to be addressed in detail, the Staff recommends that the Commission categorically reject them.

As indicated above Section 13-801(d)(3) requires Ameritech to do the work to combine elements it ordinarily combines for itself. Ameritech appears to believe, and argues, that it need not comply with the statute if a particular market is deemed competitive, or where Ameritech itself concludes that CLECs do not need a combination to compete. *See* Ameritech BOE at 40. ("The 20 new combinations being offered by the Company more than satisfy the demands made by CLECs for new combinations *allegedly* needed to fully compete in the residential and small business markets, and more than satisfy Section 13-801(d)(3).") (citations omitted; emphasis added.) This, again, is wishful thinking that, perforce, ignores inconvenient statutory language. Section 13-801(d)(3) imposes an unconditional obligation upon a carrier subject to Section 13-801 to "combine any sequence of unbundled network elements that it ordinarily combines for itself[,]" regardless of the state of the market, and regardless of Ameritech's views regarding what its competitors need. Ameritech, in essence, asks the Commission to forbear from enforcing the provisions of Section 13-801(d)(3), based upon its service that the clear plain, unambiguous provisions of the statute – the letter of the law -- conflicts with the alleged policies, as perceived by Ameritech, underlying the law. In other words, Ameritech argues that the specific provisions of the Act somehow run counter to the Act itself. This line of reasoning should be rejected. It is in fact difficult to see how any such argument could prevail.

VI. AMERITECH'S PROPOSED TARIFF DOES NOT MEET THE STATUTORY REQUIREMENTS FOR CONVERSIONS OF PRIVATE LINE SERVICE TO UNE COMBINATIONS

In its Brief on Exceptions, Ameritech takes exception to the Proposed Order's finding that Ameritech should be required to combine at the request of CLECs sequences of unbundled loops and dedicated transport for the provision of private line or point-to-point data services. Ameritech BOE at 53. Ameritech argues that it has no obligation under Section 13-801 to do the work to combine such combinations of network elements. Ameritech BOE at 54. Ameritech further argues that the Commission should approve the Company's policy for conversions of services to combinations of UNEs, rather than the process adopted in the Proposed Order. Ameritech BOE at 61.

A. The Proposed Order's Interpretation of Section 13-801(d)(3) Is Correct And Consistent With The Law

Contrary to Ameritech's assertion, the Proposed Order correctly interprets the language of Section 13-801(d)(3). While Ameritech makes numerous arguments to support its position that Section 13-801(d)(3) does not require it to combine sequences of unbundled loops and dedicated transport for CLECs that desire to provide private line or point-to-point data services to their customers,[8] the primary argument Ameritech makes is that Section 13-801 does not require Ameritech to do the work to combine unbundled network elements for CLECs. Ameritech BOE at 54. Section 13-801(d)(3) explicitly states in relevant part that:

> Upon request, **an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself**, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for

[8] *See* Ameritech BOE at 48-54.

> itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

220 ILCS 5/13-801(d)(3) (*emphasis added)*

Ameritech's argument, therefore, is directly contradicted by the plain language of Section 13-801(d)(3) and should be rejected.

The Commission should also reject Ameritech's recommendation that the Commission disregard Section 13-801(d)(3) because it is preempted by the TA 96. Ameritech BOE at 52. Although Ameritech has made the argument that the Commission is preempted by a federal enactment from enforcing state law, Ameritech has no basis for this statement. *See Section I.A, supra*. As Ameritech correctly notes, the United States Court of Appeals for the Eighth Circuit vacated FCC rules 315(c)-(f) which required ILECs to combine UNEs at the request of CLECs. Ameritech BOE at 50-51. The Eighth Circuit determined that "[t]he Act does not require the incumbent LECs to do all the work." Iowa Utilities Board v. FCC, 219 F.3d 744, 759 (8^{th} Cir. 2000) ("IUB III") cert. Granted (Jan. 22, 2001). The Eighth Circuit thus ruled that the 1996 Act does not require Ameritech to combine UNEs at the request of CLECS. Ameritech, however, asserts that the court ruled that TA 96 prohibits states from imposing such a requirement. Ameritech BOE at 51. As Novicon notes, the Fifth Circuit Court has correctly interpreted the Eighth Circuit decision, stating

> …there is nothing "illegal about the provision requiring SWBT to combine network elements for Waller or any other CLEC. Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct – which we do not decide today – it does not hold that such arrangements are prohibited, rather, it only holds that they are not required by law.

Novicon BOE at 3. The Commission should not be mislead by Ameritech's disingenuous substitution of "prohibits" for "does not require." Ameritech's argument should be rejected.

Alternatively, Ameritech argues that since federal regulations do not require Ameritech to do the work to combine UNEs for CLECs it would be inconsistent with TA 96 for the state to require them to do this work. Ameritech BOE at 51. Ameritech, again, relies on Section 261(c) of the 1996 which Ameritech states "permits a State to impose only such requirements as are consistent with both the 1996 Act and the FCC's implementing regulations on an ILEC." Ameritech BOE at 51.[9] Section 261(c) of the 1996 Act is entitled "Additional State Requirements." It states:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C. 261(c).

Thus, the 1996 Act permits States to impose additional requirements on carriers that "are necessary to further competition." Id. Ameritech argues that States may not impose requirements on carriers when the FCC does not impose those same requirements. Ameritech BOE at 52. Consequently, under Ameritech's reading, Section 261(c) would entitle States to impose only rules that the FCC already imposed –

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[9] *See* Ameritech BOE at 31 *et seq*, where Ameritech asserts that the Staff's interpretation, which was affirmed by the Proposed Order, was inconsistent with TA 1996 and several FCC orders. Ameritech's principle arguments are that the Proposed Order's interpretation of Section 13-801(c) is inconsistent with TA 1996 and FCC rules and orders. In fact, Ameritech asserts that the Proposed Order expressly runs counter to section 261(c) of TA 1996. Second, Ameritech implies that the Proposed Order violates the basic principle of statutory construction as it seems to engender unconstitutional or invalid interpretation. As Staff asserted, *supra,* these assertions are without merit. *See Section I.A, supra,* for Staff's complete analysis of Ameritech's assertions.

that is, redundant rather than additional requirements. Ameritech's interpretation of this section is not only incorrect but it also implies that this Commission does not have any additional authority to impose requirements on telecommunication carriers. Section 261(c) clearly states that "**nothing in this section precludes a State from imposing requirements on a telecommunications carrier for intrastate services**… as long as the State's requirements are not inconsistent with this part or the Commission's regulations" 47 U.S.C. §261(c) (emphasis added). Ameritech's argument, therefore, should be rejected.

Additionally, Ameritech states that "the term 'ordinarily combined,' as used in Section 13-801(d)(3), can at most be construed to refer to combinations of UNEs used to provide services offered to residential and small business customers on a widespread or mass market basis. It is undisputed that private line service is not such a service." Ameritech BOE at 55. Ameritech's argument that it does not ordinarily combine the unbundled network elements used by the company to provide private lines is flawed. As explained above, Ameritech is not arguing that it does not frequently combine these network elements, but rather that the Commission should not require Ameritech to do the work to combine unbundled network elements that are typically used for private line service. As explained above, this interpretation of ordinarily combined is inconsistent with Section 13-801(d)(3), and should be rejected. See Section V, s*upra*.

Ameritech argues that the private line market is competitive and for this reason the Commission should forbear from enforcement of Section 13-801(d)(3). Ameritech BOE at 56 and 57. Implicit direction regarding Commission implementation, derived from a combination of Ameritech's own market analysis and general statements in the

PUA, should not and do not supercede the explicit direction of Section 13-801(d)(3). Section 13-801(d)(3) explicitly requires Ameritech to do the work to combine unbundled network elements that it ordinarily combines for itself including local loops and dedicated transport -- both of which are found in the Draft I2A. Ameritech's arguments should be rejected.

B. Ameritech's Incorrectly Interprets Section 13-801(j)

In its brief on exceptions Ameritech takes exception to the Proposed Order's conclusion that "pursuant to Section 13-801(d)(3), Ameritech should be required to combine at the request of CLECs sequences of unbundled loops and dedicated transport for the provision of 'private line', or 'point-to-point' data service." Ameritech BOE at 53. In support of its position, Ameritech states that the Proposed Order's conclusion is "contradicted by section 13-801(j), which expressly states that nothing in Public Act 92-22 should be construed to require the substitution of a 'combination of network elements' for 'special access services'." Id. Ameritech reliance on 13-801(j) is misplaced.

Section 13-801(j) states:

> Special access circuits. Other than as provided in subdivision (d)(4) of this Section for the network elements platform described in that subdivision, nothing in this amendatory Act is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area.

220 ILCS 5/13-801(j). Contrary to Ameritech's assertion, Section 13-801(j) does not preclude the substitution of UNE combinations for special access. Therefore, Ameritech's argument that it does not have to provide combinations that are normally used to provide special access services is incorrect and without merit. In fact,

Ameritech seems to acknowledge that it must provide combinations that are normally used to provide special access services when it stated “[f]ederal law establishes well-defined criteria for this conversion and a tariff is not a prerequisite for accepting a CLEC's request to convert qualifying special access services or private line services to UNE loop-transport arrangements." Ameritech BOE at 58.

Ameritech asserts that the FCC rules that apply to conversions of special access circuits to combinations of UNEs should also apply to conversions of private line and point-to-point conversions to combinations of UNEs. Ameritech’s argument is two-fold. First, it argues that Section 13-801(j) requires the Commission to impose the existing Special Access to UNE conversion restrictions articulated in the FCC’s Supplemental Order Clarification. Ameritech BOE at 58. Second, Ameritech argues that the General Assembly, though it did not specifically include any reference to private lines in Section 13-801(j), intended Section 13-801(j) to apply equally to both special access and private lines. Ameritech BOE at 53. Ameritech then argues that both categories of lines be subject to the local usage test outlined in the FCC’s Supplemental Order Clarification. Ameritech BOE at 60.

Staff does not dispute that the conversion restrictions contained in the FCC’s Supplemental Order Clarification should be enforced. Staff does, however, disagree with Ameritech’s interpretation of those restrictions. In the Supplemental Order Clarification the FCC stated that “…until we resolve the issues in the Fourth FNPRM, IXCs may not substitute an incumbent LEC’s unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service in addition to exchange access service, to a particular customer. Supplemental

Order Clarification at paragraph 8. Therefore, Staff concurs with the Proposed Order finding that "…section 13-801(j) applies, on its face, solely to special access circuits, form which we infer the legislature's intent that it apply to that type of circuit, and the policy issues attributable to it alone."

Ameritech argues that:

> It is undisputed that "special access" and "private lines" are functionally identical means of providing dedicated transmission services. (Am. Ill. Ex. 2.0, p. 20; Am. Ill. Ex. 9.0, p. 5). For the purposes of Section 13-801(j), there is no basis for treating "private lines" any differently than special access based upon the difference between the service name or label. (Am. Ill. Ex. 2.0, p. 20; Am. Ill. Ex. 2.1, pp. 60-61; Am. Ill. Ex. 9.0, p. 5). This conclusion was supported by the testimony of Mr. David Gebhardt, the only witness in this proceeding who had extensive involvement in the legislative process which led to the enactment of Section 13-801. (Am. Ill. Ex. 9.0, pp. 2, 5).

Ameritech BOE at 53.

Ameritech goes on to assert that Section 790.10 of the Commission's rules accord equivalent treatment of both special access and private lines and the General Assembly is presumed to know of this Commission rule. Ameritech BOE at 53-54.

First, Ameritech's statement regarding Mr. David Gebhardt's testimony should be given no weight. For one thing, post-enactment comments are generally accorded no weight in determining legislative intent. 2A Norman J. Singer, Sutherland Statutory Construction § 48.20 (6th ed. 2000). His testimony, dated November 21, 2001, is well after the General Assembly passed the bill on May 31, 2001. [10] For another, Mr. Gebhardt's opinion is hardly an indicator of the legislature's intent in enacting the bill. One further rule of statutory construction should be considered here. In construing a

[10] *See* Ameritech Ex. 9.0. Mr. Gebhardt.

statute, it is clearly *improper* to consider testimony regarding legislative intent given by members of the legislature that enacted the statute. 2A N. Singer, Sutherland Statutory Construction § 48.16 (6th Ed. 2000), *citing, in support of the proposition,* U.S. v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); U.S. v. Chicago Board of Education, 588 F. Supp. 132 (N.D. Ill. 1984). This is especially true where, as here, the testimony is that of an individual, who is *not* even a legislator, and given *after* the passage of the statute. *See* Warren v. Borger, 184 Ill. App. 3d 38 (5th Dist. 1989) (statements of individual legislators, made after the passage of a statute, reflect only the viewpoint of those legislators, and not necessarily that of the legislature as a whole on the date the statute was passed); *see also* State Wholesale Grocers v. Great A&P Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957); *reversed in part on other grounds*, 258 F. 2d 831 (7th Cir. 1958) (the court observed that "a book subsequently written by a legislator, even though he be a co-author of the [Clayton] Act, and with all respect to his good intentions in writing such a book, should be given no consideration by a court in determining whether there has or has not been a violation of the Act.")[11]. Thus, the testimony of Mr. Gebhardt cannot be

[11] *See also*, Client Follow-Up Co. which is thoroughly distinguishable. In Client Follow-Up Co., the court, in determining the proper construction to place upon a provision of the Illinois Constitution of 1970, gave consideration to public statements of Samuel W Witwer, the President of the Illinois Constitutional Convention of 1970, and John Karns, who was the Chairman of the Convention's Revenue and Finance Committee. Client Follow-Up Co., 75 Ill. 2d at 225-26. These statements, while in several cases published in a newspaper of general circulation, were in all cases made *prior to the public referendum* in which the citizens of Illinois voted to adopt the Constitution. Id. The court observed that, in light of Witwer's and Karns' respective positions as drafters and framers of the Constitution, their statements regarding the meaning of provisions in the then-proposed Constitution would carry great weight with the voters, when they considered whether to adopt the Constitution. Id. It is clear, therefore, that the public statement of a legislator regarding legislative intent, made *after* the enactment of the statute in question, is entitled to no consideration when seeking a construction of the statute. *Cf*. 2A N. Singer, Sutherland Statutory Construction § 48.16 (post-enactment statements by a legislator *do not* form a part of the legislative history of the enactment).

considered here as giving any insight into legislative intent, or be used as an aid to statutory construction.

Next, as Staff noted in its reply brief, Ameritech, mistakenly contends that "[f]or purposes of Section 13-801(j), there is no basis for treating 'private lines' any differently than special access based upon the difference between the service name or label." Ameritech Br. at 29. Whether special access service and private line service are a "functionally identical means of providing dedicated transmission" is irrelevant for purposes of Section 13-801(j) and Ameritech's obligations under Section 13-801(d)(3). Id. at 29; see 83 Ill. Admin. Code Part § 790.10. The relevant question is the use to which the transmission facilities are put. Services often receive different regulatory treatment, notwithstanding that such services may use similar of "functionally identical" facilities. See, e.g., Tr.192-93 (Ameritech witness Wardin indicating that special access, switched access, and private lines are separate services filed in three separate tariffs at the FCC). As the FCC recognized, special access applies to IXCs and the origination or termination of interstate toll traffic. Staff Br. at 66. Point-to-point private line service between two businesses, for example, is not special access as that term is used by the FCC and to which the conversion restriction applies. What's more, Section 13-801(j) refers to switched access service and special access service, but not to private line service. The PUA treats private line service as a separate service. See 220 ILCS 5/13-13-203 (authorizing the Commission, by rulemaking, to exclude private line service not used for switched telecommunications service); id. § 13.505.1(a) (distinguishing between switched and private line service). Thus, given the General Assembly's specific reference to switched and special access in Section 13-801(j), the omission of private line service must be assumed intentional. This omission further supports the reading that the term "special access" in Section 13-801(j) should be understood to mean the special access services at issue in the FCC's special access conversion orders. Staff Reply Brief at 47-48. Consequently, Ameritech's arguments to the contrary should be rejected.

VII. THE PROPOSED ORDER PROPERLY REJECTED AMERITECH'S ERRONEOUS APPLICATION OF THE FCC'S LOCAL USAGE RESTRICTION ON CONVERTING CERTAIN SPECIAL ACCESS SERVICES TO EELs

Staff and Ameritech agree that Ameritech should file a tariff incorporating the FCC's local usage restriction on converting (i.e., repricing) certain special access services to UNE combinations known as EELs. Ameritech BOE at 73. Ameritech, however, generally contends that the FCC's local usage restriction applies to private line or point-to-point data circuits. Id. Specifically, Ameritech contends that "the local use restrictions adopted in the Supplemental Order Clarification[12] apply generally to requests for loop-dedicated transport combinations used in the 'exchange access market' of which the special 'special access market' is a 'subset,'" citing paragraphs 3, 10, and 13 of the FCC's Supplemental Order Clarification. Id. Ameritech's exception is without merit.

Staff has already refuted Ameritech's contention in its briefs (Staff Br. at 62-66; Staff Reply Br. at 45-49), and again here in reply to Ameritech's exceptions (supra, Section VI). The FCC's local usage restriction applies to special access services, not private line and point-to-point data services. Ameritech's reading of the local usage

[12] In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, Supplemental Order Clarification, FCC 00-0183 (rel. June 2, 2000) ("Supplemental Order (continued…)

restriction in the FCC's Supplemental Order Clarification as applying to all exchange access services is wrong. Although the FCC refers generally to exchange access as a general category of service or market, the services subject to the restriction are special access services.

Ameritech, however, seizes upon the FCC's general reference to "exchange access" and "exchange access market" to argue that all exchange access services are subject to the restriction. Ameritech ignores the context. For example, the FCC in paragraph 3 of the Supplemental Order Clarification summarizes the issue in general terms: "The question of whether we should allow requesting carriers to use unbundled network elements to provide exchange access service to customers to whom the requesting carrier does not provide local exchange service has arisen in three contexts." Supplemental Order Clarification, at ¶ 3. The FCC goes on to describe the three contexts, each of which involves IXCs, entrance facilities (a dedicated link from an IXC's point-of-presence to an ILEC's serving wire center), and originating or terminating interstate toll traffic. Id. Thus, the FCC's general reference to exchange access is qualified by the particular services at issue, which are a subset of special access services. In paragraph 10, the FCC summarized the ILECs' argument urging the FCC to conduct a more market-specific unbundling analysis and contending that "a denial of access to the loop-transport combinations at issue would not 'impair' a carrier's ability to provide services in the special access market or, more generally, in the exchange access market, of which the special access market is a subset." Id. ¶ 10. The FCC did

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Clarification").

not state or imply that the context had expanded to cover exchange access generally. Indeed, the FCC expressly described the special access services subject to its order as "employ[ing] dedicated, high- capacity facilities that run directly between the end user, usually a large business customer, and the IXCs point-of-presence." Id. ¶ 10 & n.36. Similarly, in paragraph 13, the FCC's mention of the exchange access market was in the context of its discussion of performing an "impair" analysis. By contrasting the local exchange market with the exchange access market for purposes of the "impair" test, the FCC did not enlarge the special access services' local usage restriction to cover all exchange access services. Ameritech simply ignores the FCC's holding in the Supplemental Clarification Order: "Therefore, until we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. Supplemental Order Clarification, at¶ 8 (emphasis added.).

In addition, the FCC's recent decision in Net2000 Communications, Inc. v. Verizon, FCC File No. EB-00-018, FCC 01-381 (rel. Jan 9, 2002), confirms that the local usage restriction applies to certain special access services. In Net 2000, the FCC summarized its action in the Supplemental Clarification Order as follows:

> The Commission modified the *UNE Remand Order* to provide that, pending consideration and resolution of these policy concerns in the pending Fourth Further Notice of Proposed Rulemaking, 'interexchange carriers ("IXCs") may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties).' The Commission emphasized, however, that '[t]his constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.'

Net2000 at ¶ 7 (internal footnotes omitted).

Earlier, the FCC in its Third Report and Order, the UNE Remand Order,[13] described the issue as follows: "The special access service that BellSouth and SBC refer[red] to consists of entrance facilities from the interexchange carrier's point of presence (POP) to an incumbent LEC's switch or serving wire center (SWC), a dedicated transport link from the SWC to an end office, and a channel termination facility from the end office to the end user." UNE Remand Order, at ¶ 485; see Staff Br. at 63. Thus, the local usage restriction applies to a subset of exchange access, special access services. Arguably, the local usage restriction applies more narrowly to a particular class of special access services concerning IXC's entrance facilities. In no instance, however, does the restriction apply to all exchange access services as Ameritech contends. Accordingly, the Proposed Order properly rejected Ameritech's attempt to impermissibly enlarge the range of services subject to the FCC's local usage restriction on converting special access services to UNE combinations.

The Proposed Order did not adopt this narrower application of the local usage restriction as applying only to a particular class of special access services. Staff concurs with Ameritech that the FCC has not been exactly clear on whether the restriction applies only to a particular class of special access services or more generally to all special access services under its jurisdiction. Therefore, based on this uncertainty, Staff did not take exception to the Proposed Order's recommendation to apply the restriction in the interim to all special access services under the FCC's

[13] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order").

jurisdiction. See Proposed Order, at 70. Although the Proposed Order did not adopt the narrower application as advocated by Staff, its conclusion is nonetheless not inconsistent with the FCC's holdings in this area.

VIII. THE PROPOSED ORDER PROPERLY REJECTED AMERITECH'S PROPOSED RESTRICTIONS ON ENHANCED EXTENDED LINKS ("EELs")

Ameritech argues that its proposed EELs tariff properly limits the services that may be supported thereby to circuit switched or packet switched services, and should be approved. Ameritech BOE at 61 *et seq*. Ameritech argues that this tariff should include switched circuit and terminations restrictions and should include no provision for the conversion of existing combinations of UNEs to EELs combinations. Ameritech BOE at 61-67.

Ameritech argues that both switched circuit and termination restrictions included in its Draft I2A should be applied to its provision of EELs. Ameritech BOE at 62. Ameritech argues "[t]he 'circuit switched or packet switched' restriction is an integral condition of the EEL combinations listed in the Draft I2A and, therefore, comports precisely with Section 13-801(d)(3)'s directive to provide those combinations. Ameritech BOE at 62. In support of this assertion, Ameritech references the testimony of Ameritech witness Scott Alexander. Ameritech BOE at 62. This reference apparently refers to the following question and answer in Mr. Alexander's testimony:

> Q. Mr. Gillan proposes to eliminate language from the Staff tariff that would limit the availability of DS1 loops to "circuit switched telephone exchange service" on the grounds there is nothing in Section 13-801 that "condones technology discrimination against networks." Please comment on Mr. Gillan's proposal.
>
> A. The language Mr. Gillan proposes to delete is contained in the Company's proposed EELs tariff, and is directly from the Draft I2A. Accordingly, it

> comports with the PUA's directive to provide the combinations in the Draft I2A.

As Mr. Alexander's testimony indicates, Ameritech's only support for its position is that its proposed switched circuit restrictions were included in the Draft I2A. Ameritech provides similar support for its termination restrictions. Ameritech BOE at 63. The I2A included voluntary offerings unilaterally drafted by Ameritech. Ameritech's argument that it's self imposed restrictions should remain simply because they were included in the I2A should be rejected.

Further, Ameritech argues that "[t]he General Assembly should be presumed to have reviewed the Draft I2A and been aware of its contents when it included a specific reference to the Draft I2A combinations in Section 13-801(d)(3)." Ameritech BOE at 63. However, Section 13-801(d)(3) does not require Ameritech to provide the combinations in Section 13-801(d)(3). Rather, Section 13-801(d)(3) requires Ameritech to perform the work to combine unbundled network elements including those unbundled network elements contained in the Draft I2A. This language suggests that the legislature rejected the limitations imposed on the actual combinations of UNEs included in the I2A. Regardless, Section 13-801(d)(3) specifically includes the phrase "including but not limited to," and, therefore, does not prohibit Ameritech (or prohibit the Commission from ordering Ameritech) from requiring Ameritech to remove switched circuit restrictions and termination restrictions from its tariff. Ameritech's arguments to the contrary should be rejected.

The Proposed Order characterized Ameritech's description of EELs, which Ameritech described as a mechanism for collocated carriers to obtain access to customers in end offices where they are not collocated, as "self serving and self authored". Proposed Order at 78. Ameritech takes exception to this characterization. Ameritech BOE at 65. In support of its argument, Ameritech refers to a similar statement included in the FCC's UNE Remand Order. Ameritech BOE at 64-65. What Ameritech fails to reveal, however, is that the FCC has recently clarified that

> Although the language quoted above specifically addressed the situation of collocated carriers, we did not state or imply that only collocated carriers had a right to use unbundled network elements or convert special access circuits to EELs. Indeed, following the paragraph relied upon by Verizon, we specifically clarified "that interexchange carriers are entitled to use unbundled dedicated transport from their POP to a serving wire center in order to provide local telephone exchange service." This language recognizes the viability of a conversion to an EEL in a non-collocation network configuration. Also, as Verizon points out, our Supplemental Order specifically modified paragraph 486 in the UNE Remand Order, to the extent that that paragraph would have allowed collocated carriers to convert their special access circuits to EELs without any restrictions requiring local exchange service use. However, the language in the Supplemental Order permitting the conversion of special access to EELs for use "to provide a significant amount of local exchange service" clearly applies to both collocated and non-collocated situations.

Net2000 Communications, Inc. v. Verizon, FCC File No. EB-00-018, FCC 01-381, ¶ 26 (Released Jan. 9, 2002)

This passage indicates that Ameritech's characterization of EELs is inconsistent rather than consistent with the FCC's characterization of the same. Ameritech fails to cite this provision despite the fact that it has cited the decision in support of its own positions. See Ameritech BOE at 70. Therefore, while perhaps not entirely self authored, the Proposed Order is correct in concluding that Ameritech's rationale for providing EELs is "self-serving", and as demonstrated above, more than a bit disingenuous.

Regarding the relationship between new and existing EELs, Ameritech argues that "Federal law establishes well defined criteria for this conversion and a tariff is not a prerequisite for accepting a CLEC's request to convert qualifying special access services or private line services to UNE loop-transport arrangements." Ameritech BOE at 66. However, Section 13-801(d)(2) of the PUA states

> An incumbent local exchange carrier shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier.

Thus, Ameritech requests that provisions of Section 13-801(d)(2) be omitted from its implementing tariff. This proposal should be rejected. Ameritech's assertion that federal law establishes "well defined criteria" for conversions to UNE combinations is refuted by the substantial debate within the immediate proceeding over the interpretation of the federal conversion rules. In fact, as noted above, Ameritech itself relies on Section 790.10 of the Commission's rules rather than federal rules to interpret federal conversion criteria. Further, as explained below, it is far from certain how Ameritech applies federal conversion rules, such as the local usage restriction. Therefore, it is of the utmost importance that the Commission, in order to ensure compliance with Section 13-801(d)(2), require Ameritech to tariff its conversion provisions.

IX. THE PROPOSED ORDER CORRECTLY CONCLUDES THAT EACH CARRIER SHOULD BEAR ITS OWN COSTS ON ITS OWN SIDE OF THE POINT OF INTERCONNECTION

The Proposed Order correctly adopted Staff's recommendation that each carrier bear its own costs on its side of the point of interconnection ("POI"). Its conclusion is consistent with federal and state law, supported by the record, and represents a just and reasonable apportionment of costs that are caused by two carriers jointly provisioning telephone service. Staff recommended that Ameritech and a CLEC should bear their own costs of facilities on their own side of a single POI. Staff Br. at 18-23; Staff Ex. 2.0 (Zolnierek Direct) at 12-13. Staff informed that federal and state law require that Ameritech allow requesting CLECs to elect a single POI arrangement. Staff Br. at 11-12. In addition, Staff demonstrated that it is just and reasonable that Ameritech and a CLEC be both physically and financially responsible for its side of the POI. Staff Br. at 19-23; Staff Reply Br. at 18. Staff acknowledged that interconnection imposes costs on both Ameritech and a CLEC, Staff Ex. 2.1 (Zolnierek Rebuttal) at 6, but showed that under Ameritech's proposal, a CLECs would be forced to bear not only costs on its side of the POI, but also Ameritech's costs on Ameritech's side of the POI, Staff Br. at 19; Staff Reply Br. at 14-15. Staff showed that Ameritech's proposal would essentially undermine a CLEC's federal and state right to elect a single POI. Staff explained that by requiring a CLEC to bear Ameritech's costs on Ameritech's side of the POI, Ameritech's proposal creates multiple "virtual" POIs along the local calling boundary of the physical POI, thereby undermining a CLEC's right to a single POI. Staff Br. at 19-20; Staff Ex. 2.0 (Zolnierek Direct), at 12-13. In sum, just a CLEC bears responsibility for all of the costs of its own traffic, and just as Ameritech bears responsibility for all of the costs of calls from one Ameritech customer to another, it is just and reasonable that each carrier bear responsibility for the costs of calls to and from the other carrier on its side of the POI.

Ameritech excepts to the Proposed Order's conclusion allowing CLECs to elect as few as one POI per LATA and requiring that each carrier bear responsibility for facilities and transport on its side of the POI. Ameritech requests that the Commission accept its proposal to require CLECs to pay all additional transport costs Ameritech incurs by interconnecting with CLECs that do not establish POIs in each Ameritech local calling area. (Ameritech BOE, at 92.) Ameritech makes several arguments in support of its position, none of which have merit and all of which should be rejected.

A. An Arrangement Where Each Carrier Bears Transport Costs on Its Side of the Single POI Is Not Expensive Interconnection

Ameritech first contends that the FCC's Local Competition Order suggests that the CLECs alone should bear the costs of additional transport. Specifically, Ameritech contends that a single POI is "expensive interconnection" as the FCC used that term in paragraph 199 of its Local Competition Order, and which would require a CLEC to bear the cost of that interconnection including a reasonable profit. Ameritech BOE, at 93-94. It is mistaken. The issue of expensive interconnection as mentioned in Paragraph 199 of the Local Competition Order is inapplicable to the instant dispute. In its tariff, Ameritech seeks recovery for additional transport costs. (Ameritech Ex. 6.0 (Mindell Direct at 9-10) (describing how a local might require expensive transport)); see id. at 11-12 (describing how a local call might require expensive transport). And, Ameritech described its proposal in its brief as follows: "Ameritech Illinois' tariff would permit it to bill transport and switching charges for the use of its network when the CLECs choice of a single point of interconnection architecture required Ameritech Illinois to transport a call more than 15 miles." Ameritech Br. at 135; Proposed Order, at 87. The FCC, however, defines "interconnection" to expressly exclude "transport" and "termination" of traffic. "Interconnection is the linking of networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." 47 C.F.R. § 51.5 (defining "interconnection"); see Local Competition Order, at ¶¶ 174-76. In addition, the

FCC in its Intercarrier Compensation NPRM[14] described the issue in dispute here as one of transport, not interconnection:

> As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point. Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILECs network. These rules also require that an ILEC compensate the other carrier for transport and termination for local traffic that originates on the network facilities of such other carrier. Application of these rules has led to questions concerning which carrier should bear the costs of transport to the POI, and under what circumstances an interconnecting carrier should be able to recover from the other carrier the costs of transport from the POI to the switch serving its end user. In particular, carriers have raised the question whether a CLEC, establishing a single POI within a LATA, should pay the ILEC transport costs to compensate the ILEC for the greater transport burden it bears in carrying the traffic outside a particular calling area to the distant single POI. Some ILECs will interconnect at any POI within a local calling area; however if a CLEC wishes to interconnect outside the local calling area, some LECs take the position that the CLEC must bear all costs for transport outside the local calling area. CLECs hold the contrary view, that our rules simply require LECs to interconnect at any technically feasible point within a LATA, and that each carrier must bear its own transport costs on its side of the POI.

Intercarrier Compensation NPRM, at ¶ 112 (footnotes omitted and emphasis added); see id. ¶¶ 113-14 (discussing transport costs). Thus, Ameritech's reliance on the FCC's discussion of "expensive interconnection" in paragraph 199 of its Local Competition Order is misplaced.

In any case, Ameritech has presented no evidence of its costs concerning a single POI arrangement, let alone establish that its purported costs amount to "expensive interconnection." Ameritech submitted no cost studies and provided no evidence from which the Commission could determine that the transport costs

[14] In re Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. Apr. 27, 2001) ("Intercarrier Compensation NPRM").

Ameritech seeks to recover from CLECs amount to “expensive interconnection” as that term is used by the FCC. Ameritech points to no FCC order or decision describing what constitutes “expensive interconnection” or even which factors this Commission should consider. The sole justification Ameritech gives in support of its contention is that in certain circumstances it will be required to transport calls further than if it alone were the sole provider of local exchange service in its service area. (Ameritech BOE, at 94). This justification hardly demonstrates a technically feasible, but “expensive interconnection.” Based on Ameritech’s understanding of “expensive interconnection,” apparently the only interconnection architecture that a CLEC may elect that is not expensive is one that provides for a POI in each Ameritech local calling area and thus mirrors Ameritech’s own architecture. Ameritech’s conclusory assertion that a single POI amounts to “expensive interconnection,” as that term is used by the FCC, is erroneous, unsupported by the record and, therefore, should be rejected.

B. Staff Demonstrated That Ameritech’s Proposal Would Essentially Undermine a CLEC’s Right to a Single POI Under Section 13-801 and Federal Law

Staff showed that Ameritech’s proposal undermines the right to a single POI by effectively creating multiple POIs. Staff Br. at 19-20, 22. Against this showing, Ameritech contends it should be compensated for the use of its network. Ameritech BOE at 101-04. Ameritech’s argument, however, ignores the fact that the interconnection of Ameritech’s network and a CLEC’s network for the joint provision of telephone service creates costs for both carriers. Ameritech’s asymmetrical proposal provides for the recovery of only its costs, requiring a CLEC to bear the full cost of CLEC-originated traffic, while failing to require Ameritech to bear the full cost of

Ameritech-originated traffic. Staff showed, and the Proposed Order correctly found, that requiring each carrier to bear its own costs on its side of the POI is a just and reasonable apportionment of the costs jointly incurred.

The FCC's Verizon Pennsylvania 271 Order does not, as Ameritech contends, "foreclose" finding that requiring a CLEC to pay Ameritech for additional transport costs on Ameritech's network would undermine the CLEC's right to a single POI. Ameritech BOE at 94. In its Verizon Pennsylvania 271 Order, the FCC specifically stated:

> The issue of allocation of financial responsibility for interconnection facilities is an open issue in our Intercarrier Compensation NPRM. We find, therefore, that Verizon complies with the clear requirement of our rules, i.e., that incumbent LECs provide for a single *physical* point of

> interconnection per LATA. Because the issue is open in our Intercarrier Compensation NPRM, we cannot find that Verizon's policies in regard to the financial responsibility for interconnection facilities fail to comply with its obligations under the Act.

Verizon Pennsylvania 271 Order, at ¶ 100 (footnotes omitted).

Thus, even assuming for the sake of argument that the FCC had the transport costs at issue here in mind in the Verizon Pennsylvania 271 Order, the FCC did not hold, as Ameritech contends, that its single POI rule is not undermined by an asymmetrical cost recovery proposal like the one Ameritech proposed here. The FCC merely determined that Verizon's policies distinguishing between the physical and financial aspects of the POI did not violate a clear requirement of its single POI rules, and went no further because the issue of the financial responsibility for interconnection facilities is open in its Intercarrier Compensation NPRM. Id. ¶ 100. Notably, the FCC did not discuss the scope and application of its reciprocal compensation rules, particularly 47 C.F.R. § 703(b), to the allocation of financial responsibility for transport costs. In its Intercarrier Compensation NPRM, the FCC said that it would consider the interplay between its single POI rules and its reciprocal compensation rules. Intercarrier Compensation NPRM, at ¶ 114. Moreover, the FCC has cautioned against drawing inferences regarding the interpretation and application of its rules and policies from conclusions it makes within the limited context of a Section 271 proceeding.[15] *In re*

[15] For example, in the Kansas/Oklahoma 271 Order, the FCC explained:

> [D]espite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors—disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such

(continued…)

Joint Application by SBC Communications, Inc. et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (rel. Jan. 22, 2001) ("Kansas/ Oklahoma 271 Order"), at ¶ 19; *see Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Service in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 ¶ 25 (rel. June 30, 2000). In the absence of an authoritative contrary pronouncement by the FCC, the Proposed Order's conclusion requiring each carrier to bear the costs on its side of the POI is fully consistent with the FCC's rules and the 1996 Act.

C. Ameritech's Contention that Section 703(b) Is Irrelevant to Its Proposal Is Incorrect

Ameritech further argues that the Proposed Order erred in concluding that Ameritech's proposal contravened Section 51.703(b) of the FCC's rules. Ameritech BOE, at 96; see 47 C.F.R. § 51.703(b). Ameritech's argument is without merit. Ameritech's contention that the term "charges" in Section 51.703(b) necessarily means reciprocal compensation charges and, therefore, is inapplicable to its proposal is incorrect. Subpart H of Part 51 of the FCC's rules governs reciprocal compensation for

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> disputes as a precondition to granting a section 271 application. Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular state at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.

(Kansas/Oklahoma Order ¶ 19 (internal footnotes omitted).

transport and termination of traffic between LECs and other telecommunications carriers. 47 C.F.R. § 51.701(a). Section 51.701(b) defines telecommunications traffic to mean local traffic.[16] Section 51.703 establishes the reciprocal compensation obligations of LECs. Under Section 51.703(a), LECs must establish reciprocal compensation arrangements for transport and termination of local traffic with other carriers. Section 703(b) prohibits LECs from charging other carriers for local traffic that originates on the LECs' network.

The FCC has construed Section 51.703(b) to mean what it says: LECs may not assess charges on other carriers for LEC-originated local telecommunications traffic delivered to the POI. In TSR Wireless, LLC v. U.S. West Communications, Inc., Docket Nos. E-98-13 et al., FCC 00-0194 (rel. June 21, 2000), the FCC held that the Commission's reciprocal compensation rules, including Section 51.703(b), prohibited the defendant ILEC from charging complainant paging companies for the delivery of LEC-originated, intraMTA traffic to the paging carrier's POI. Id. ¶ 18. The FCC further held that "the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Id. ¶ 25. In so holding, the FCC did not on one hand prohibit U S West from charging the paging company complainants for delivering LEC-originated traffic to the POI, but on the other hand authorize U S West to charge for the same facilities used to deliver the LEC-

[16] As used here, "local traffic" refers to traffic subject to the provisions of Section 251(b)(5) of the 1996 Act. See 47 C.F.R. § 51.701(b) (defining "telecommunications traffic"). Staff notes that the FCC removed the term "local telecommunications traffic" from Section 51.701(b), preferring instead to refer to traffic included within Section 51.703(b) by exclusion. The traffic between a LEC and a telecommunications carrier other than a CMRS provider subject to the FCC's reciprocal compensation rules is telecommunications traffic "except for telecommunications traffic that is interstate or intrastate exchange access , information access, or exchanger services for such access." 47 C.F.R. § 51.701(b)(1). For the sake of convenience, Staff refers to this traffic as "local traffic."

originated traffic to the POI through some other mechanism (e.g., transport cost charges or access charges). The FCC held that U S West could not charge the paging companies for the facilities and traffic used to deliver LEC-originated local traffic to the POI.[17]

The FCC did not find the distance between the location of the LEC end user originating the call and the POI relevant to its application of the rule. In TSR Wireless, the FCC observed that "MTAs are typically large areas that may encompass multiple LATAs, and often cross state boundaries," but nevertheless held that Section 51.703(b) prohibited a LEC from charging "CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules." Id. ¶ 31. The FCC explained, "[s]uch traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier." Id. Similarly here, a call that originates and terminates in the same local calling area, but travels a distance greater than 15 miles is nevertheless considered local traffic. It falls under the FCC's reciprocal compensation rules and Section 703(b) prohibits Ameritech from charging CLECs for such LEC-originated traffic. Thus, Ameritech's contention that Section 703(b) is irrelevant to its proposal to charge other carriers for delivery of certain local traffic[18] to and from the POI is incorrect.

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[17] In addition, in its Intercarrier Compensation NPRM, the FCC stated that "[o]ur current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILECs network." Intercarrier Compensation NPRM, at ¶ 25 & n.180 (citing TSR Wireless and the Kansas/Oklahoma 271 Order). The FCC noted that application of its rules have led to questions about cost recovery and POIs and has sought comment on, among other things, the interplay between its single POI rules and its reciprocal compensation rules. Intercarrier Compensation NPRM, at ¶ 112-114.

[18] This discussion applies to the portion of Ameritech's proposal involving local traffic. The Commission (continued…)

D. None of the Authorities Cited By Ameritech Justifies Modifying the Result Reached by the Proposed Order

Ameritech cites to two decisions, one from the Third Circuit Court of Appeals and the other from the North Carolina Utilities Commission ("NCUC"), that neither are controlling on this Commission nor undermine the Proposed Order's findings and conclusions. MCI Telecommunications Corp. v. Bell-Atlantic Pennsylvania, 271 F.3d 491 (3d Cir. 2001); *In re Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc. and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket Nos. P-140 and P-646, 2001 N.C. PUC Lexis 229, Recommended Arbitration Order (N. Car. Utils. Comm'n Mar. 9 2001) (4 to 2 decision). (Ameritech BOE 98-100). The Third Circuit merely suggested that the Pennsylvania PUC consider the issue of costs surrounding POIs. There is no indication in the opinion that the court considered all relevant FCC rules, the costs WorldCom might incur on its side of the POI, and whether requiring each carrier to bear its own costs is a more equitable solution. The Proposed Order evaluated all of those considerations and more and rejected Ameritech's proposal to shift costs to CLECs. The Proposed Order correctly determined based on the record evidence that each carrier should bear its own costs on its side of the POI.

A fair comparison of the majority and dissenting opinions in the NCUC decision reveals that the dissent has the better of the argument on both the law and "equities."

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correctly accepted Staff's recommendation to defer the issue of foreign exchange (FX) and FX-like traffic to an industrywide proceeding. Proposed Order, at 106.

Generally speaking, the majority opinion (pp. 9-17) reflects Ameritech's position and the dissenting opinion (pp. 46-56) reflects Staff's position. Like Ameritech's proposal, here, the majority opinion viewed the issue as one in which the CLEC's choice of interconnection imposes costs on the ILEC that must in equity be recovered solely from the CLEC. But as Staff explained, that view assumes the ILEC's network is entitled to priority over a CLECs network when the appropriate perspective is a neutral focus on the interconnection of both networks. Although a majority of the NCUC ultimately determined that the CLEC, AT&T, should bear the costs of the transport beyond the local calling area, it was searching for an equitable and fundamentally fair resolution of the POI issue that did not force a CLEC to bear all of the costs. NCUC Decision, at 16. The NCUC observed that

> [public policy considerations and common sense] would suggest that "while the ILEC should not be expected to bear all the transport costs, neither should the [CLEC]. Perhaps, there is a reasonable apportionment that might be arrived at to reflect the true costs involved. Unfortunately, we have not been provided the record that would make this possible for the Commission to decide at this time

Id.

The Proposed Order provides that fair, equitable, and pro-competitive apportionment by requiring that each carrier bear its own costs on its side of the POI. This conclusion was made based on an ample evidentiary record. As Staff explained, and the Proposed Order accepted, under a POI arrangement, both carriers incur costs in establishing facilities and transporting traffic to and from the POI and each carrier should bear its costs on its side of the POI.

At least one other state commission has reached the same conclusion as the Proposed Order. The New York Public Service Commission ("NYPSC"), in an arbitration between Verizon New York and AT&T, rejected Verizon's position that AT&T should bear the costs for transporting traffic beyond Verizon's local calling areas to the POI. *Joint Petition of AT&T Communications of New York, Inc., TCG New York, Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York, Inc*, Case 01-C-0095, Order Resolving Arbitration Issues (N.Y. Pub. Serv. Comm'n July 30, 2001), 2001 N.Y. PUC Lexis 495 at *50. The NYPSC ruled that "each party [is] responsible for the costs associated with the traffic that their respective customers originate until it reaches the point of interconnection." Id.

Furthermore, the Proposed Order is consistent with a recent Proposed Arbitration Decision issued by ALJ Wallace in Docket 01-0786. Global NAPs, Inc., *Petition for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Proposed Arbitration Decision, Docket 01-0786 (Illinois Commerce Comm'n April 4, 2002). There, in an arbitration under Section 252 of the 1996 Act, ALJ Wallace's Proposed Order adopted Staff's position and required carriers to bear their own costs on their respective sides of the POI. Id. at 8.

E. The Proposed Order Is Fully Consistent with the Commission's Level 3 Arbitration Decision

Ameritech wrongly contends that the Proposed Order is contrary to the Commission's Level 3 Arbitration Decision.[19] Ameritech BOE at 100. Its contention

[19] Level 3 Communication Inc., Petition for Arbitration Pursuant to Section 252 (b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Arbitration Decision, ICC Docket 00-0332, (Aug. 30, 2001) ("Level (continued…)

suffers from both a misreading of the Proposed Order and the Level 3 Arbitration Decision. To start, contrary to Ameritech's contention (Ameritech BOE, at 100), the Proposed Order did not find that the Level 3 Arbitration Decision "compel[led]" it to reject Ameritech's proposal; rather, the Proposed Order found the decision instructive, noting that the Commission in the Level 3 Arbitration Decision had relied in part on the FCC's TSR Wireless order to reach a similar conclusion regarding FX/Virtual NXX service and had likewise rejected policy arguments similar, if not identical, to the ones made by Ameritech here. Proposed Order, at 105-06; see Level 3 Arbitration Decision, at 9. Ameritech also misreads the holding in the Level 3 Arbitration Decision as "affirmatively requir[ing] a CLEC to deploy *two* POIs in the LATA once the traffic exchanged between the CLEC and Ameritech Illinois exceeds an OC-12 level." Ameritech BOE, at 100 (emphasis in original). In the Level 3 Arbitration Decision, both parties, Level 3 and Ameritech agreed that additional POIs in the Chicago LATA were appropriate, but merely disagreed over what level of traffic dictated an additional POI. Level 3 Arbitration Decision, at 30. Level 3 claimed an additional POI should be established once the traffic exchanged between the two carriers met or exceeded the OC-12 level; Ameritech argued for an additional POI at a lower level of traffic, DS-3. Id. Hence, the issue before the Commission was at what level of traffic should an additional POI be installed, not whether the Commission should require Level 3 to establish more than one POI in a LATA. Id. ("The question then is, what is the appropriate level of traffic?"). The Commission found Level 3's proposal of an OC-12 reasonable and the

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3/Ameritech Arbitration Decision").

appropriate level of traffic before Level 3 establishes an additional POI in the Chicago LATA. Id. at 31. Therefore, contrary to Ameritech's contention, the Commission in the Level 3 Arbitration Decision did not hold that Level 3 must deploy two POIs in a LATA in contravention of its federal and state right to choose one technically feasible POI.[20] Likewise, the Commission most certainly did not hold, as Ameritech contends, that "even when there is a requirement to permit interconnection at a single point in a LATA, it is equitable to require CLECs to choose between establishing a second POI or paying Ameritech Illinois additional transport (associated with FX)." Ameritech BOE, at 100-01. Accordingly, as the Proposed Order correctly found, the Level 3 Arbitration Decision bolsters, not undermines, its conclusion.

F. The Proposed Order Reflects a Just and Reasonable Apportionment of Costs that Are Caused by Two Carriers Jointly Provisioning Local Telephone Service

Ameritech also argues against the Proposed Order, contending that it would be unjust and unreasonable and in violation of Section 13-801 and the 1996 if Ameritech were required to bear its costs on its side of the POI. Ameritech BOE, at 101. For support, Ameritech relies on the general economic principle of cost causer, cost-payer. Id. at 101-02. According to Ameritech, because the other carriers are the sole causers of additional costs in connection with the single POI arrangement it is only fair that they should bear all of those costs. Id. Ameritech's argument is based on a faulty premise, however. The CLECs are not the sole causers of costs in a POI arrangement. As Staff

[20] Under Section 13-801(b)(1), as well as the 1996 Act, CLECs are entitled to interconnect with Ameritech's network at any technically feasible point within a LATA. Ameritech makes no claim that a single POI is technically infeasible.

explained, when two carriers interconnect they jointly cause costs in connection with that interconnection, which allows their customers to make internetwork calls. Staff Br. at 9-11.

To illustrate how Ameritech's faulty premise leads to an inequitable apportionment of costs, consider the following example. Assume a call from a CLEC customer located in Aurora to an Ameritech customer also located in Aurora. Further assume that a POI between Ameritech and a CLEC is located in downtown Chicago. Under Ameritech's proposal, the CLEC is financially responsible for delivering the call to the CLEC's switch in Chicago. The CLEC is then financially responsible for delivering the call to the POI and from the POI to within 15 miles of Ameritech's Aurora end office. Under reciprocal compensation rules, Ameritech is entitled recover its costs associated with transport and termination for the last 15 miles of the call from the CLEC to its customer. Thus, when reciprocal compensation is taken into account, the CLEC bears financial responsibility for all transport on both sides of the POI for this call.

Now assume the call is reversed, the Ameritech customer calls the CLEC customer. In this scenario, Ameritech agrees to bear financial responsibility for a portion of the costs (15 miles of the total mileage) required to deliver the call from its customer in Aurora to the POI in Chicago. Under the FCC's reciprocal compensation rules, Ameritech will also bear financial responsibility for a potion of the costs (approximately 15 miles of the total mileage) required to deliver the call from the POI in Chicago to the CLEC's customer in Aurora. Therefore, under the calling scenario described, the CLEC bears all financial responsibility for transport costs for calls made by its customers to Ameritech's customers, but Ameritech bears only a fraction of the very same transport costs when its customers call a CLEC's customers. Unless the CLEC is decidedly more efficient than Ameritech in providing service it is unlikely that it will be able to profitably serve the average local telephone customer under this regime.

Ameritech's argument reflects a narrow, monopolistic viewpoint that the Proposed Order correctly rejected. As Staff noted in its reply brief

> Despite the obvious benefits to its customers from interconnecting with other networks, Ameritech's assertion reflects a view that it is the responsibility of any carrier connecting with its network to incur the costs 'it causes' by interconnecting with Ameritech. Ameritech's proposal would discourage interconnection between itself and nascent CLECs. Ameritech is in a position to promote this view due to its status as a dominant carrier in the local telecommunications market. As a dominant carrier, Ameritech is in the unique position of benefiting from the breakdown of intercarrier interconnection. It is unlikely that customers would subscribe to a CLEC's local telecommunications service if that CLEC were unable to interconnect to Ameritech's network. Consistent with such incentives, Ameritech has proposed inequitable interconnection terms that discourage CLEC interconnection.

Staff Reply Br., at 13-14.

The Proposed Order's conclusion that each carrier should bear its costs on its side of the POI is just and reasonable and fully consistent with Section 13-801 and federal law.

G. The Proposed Order Correctly Rejected Ameritech's Request to Charge CLECs for the Transport of FX and FX-like Traffic to a Single POI

Ameritech contends the Proposed Order should be modified to allow it to charge CLECs for the transport of FX traffic to a single POI. Ameritech BOE, at 104. Its contention, however, is based on a misreading of the Commission's Level 3 Arbitration Decision, as demonstrated above, and, accordingly, should be rejected. As Staff recommended, with respect to FX or FX-like traffic, the Commission should follow the reasoning in its Level 3/Ameritech Arbitration Decision in this proceeding and require

Ameritech and CLECs to bear their own costs on their respective sides of the POI. Staff Br. at 23. In its Level 3/Ameritech Arbitration Decision, the Commission found in favor of Level 3 on the issue of whether Level 3 should be required to compensate Ameritech for interexchange transport and switching associated with its FX/Virtual NXX service. Id. at 6-9. The Commission indicated that in the provision of FX/Virtual NXX service the originating carrier is responsible for the cost of delivering the call to the network of the co-carrier who will terminate the call, but that the terminating carrier is not eligible to receive reciprocal compensation for non-local call termination. Id. at 9. Ameritech has presented no persuasive reason that would justify departing from the reasoning of that decision at this time. Ameritech's suggestion that the holding in the Level 3 Arbitration Decision applies only to situations where multiple POIs are required is incorrect. See Ameritech BOE, at 104-05. The holding in the Level 3 Arbitration Decision applies to a single POI and, where Level 3 and Ameritech establish them, multiple POIs. Id. at 9-10.

Staff recommended that the Commission consider the FX issue in a different proceeding. Staff Br. at 22-23. Staff pointed out that the parties in this proceeding have not adequately addressed the FX issue and the record is insufficient to fully consider Ameritech's concerns or implement a solution that differs from the Commission's conclusion in the Level 3 Arbitration Decision. The Proposed Order appropriately adopted Staff's recommendation and Ameritech presents no persuasive reason against performing a comprehensive review of the FX issue in a generic, industrywide proceeding.

H. Ameritech's Conditional Request to Modify the Order Should Be Rejected

Finally, Ameritech contends that even if the Commission adopts the Proposed Order's conclusion that each carrier should bear its own costs on its side of the POI for local, FX, and FX-like traffic, the Order nevertheless should be modified in several ways. Ameritech's contention is without merit. Ameritech first asserts that, assuming the Proposed Order's conclusion hinges on federal law, language should be added to the Proposed Order expressly obligating the Commission to reexamine its decision and revise its order if federal law changes. Ameritech BOE, at 106-107. It also requests that in modifying the Proposed Order to obligate the Commission to reexamine its decision, the obligation should attach to any order in which the FCC resolves the issue. Id. at 107. There is no need to modify the Proposed Order to obligate the Commission to reexamine this issue. The Commission is empowered to rescind, alter or amend its orders at any time. 220 ILCS 5/13-113. In addition, the FCC has undertaken a comprehensive review of its reciprocal compensation and interconnection rules in the Intercarrier Compensation NPRM. Unless otherwise directed by the FCC, it is appropriate to wait until the FCC releases its order in the Intercarrier Compensation NPRM, rather than reexamine the issue piecemeal. Further, Ameritech contends that the Proposed Order's conclusion on the single POI issue should be modified to exclude FX and what it describes as other forms of non-local traffic. Ameritech BOE, at 107-08. This contention should be rejected for the reasons already stated in the discussion of the FX and FX-like traffic above. The Proposed Order correctly determined that these should be considered in a separate proceeding.

CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that the Commission adopt the Proposed Order in this proceeding after making the clarifications and modifications recommended by Staff above and in its Brief on Exceptions.

Respectfully submitted,

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